CURRENT LEGISLATION

CRIMINAL BAIL BONDS.—Every large city in the United States is troubled over criminal bail bonds. The latest evidence of disquiet is the hearings in *People* v. *John Doe,* held during January, 1921, before Magistrate Simpson of the City Magistrates' Court of New York.[1] These hearings revealed a group of responsible surety companies receiving regularly two per cent premium upon bail bonds; but radiating from some of these a system of agents, attorney-holders working for a commission, and satellites of the latter utterly beyond the control of the companies. Bonds were written with no investigation of the previous criminal career of the accused,[2] no record made of the collateral accepted,[3] no investigation of the ownership of the collateral.[4] Magistrate Simpson's moral conviction seems well founded that, though no legal proof was made out, agents were accepting as collateral the very jewelry with the larceny of which the accused was charged. Some of the best of the surety companies were ignorant of these practices of the employees of their agents; several companies seem to have winked at them; in any event, there was no control or attempt to check them.[5] The results have been two-fold: estimates indicate that perhaps half the bail bonds in New York County were written by the fifteen agents of a professional bondsman who had a criminal record, was of little financial responsibility; and who, it was testified, was ready to seize for collateral a ring from the finger of a woman seeking his help.[6] Charges were flagrantly extortionate.[7] Moreover it has been possible in New York, as in Chicago and Detroit, for a burglar on bail to bring upon himself four fresh indictments during the period pending trial for the original offense.[8]

This evidence reveals at once the difficult course which any reform of bail

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[1] Over one thousand pages of testimony were contributed by officers of surety companies; by men holding underwriting powers, but only loosely connected with the companies; by conspicuous representatives of the class of professional bondsmen and indemnitors; and by victims of the latter. Magistrate Simpson's opinion appears in 64 N. Y. L. J. 1901. The testimony is on file in the Office of the District Attorney for New York County.

[2] *Testimony,* 95 *et seq.,* 265 *et seq.,* 277, 535. One bondsman admitted that the character of the defendant was investigated in about ten out of four hundred cases. *Ibid.,* 119.

[3] *Testimony,* 121, 131, 310 *et seq.*

[4] *Testimony,* 57, 130, 464.

[5] Orders of some companies not to bail second offenders or hold-up men were persistently violated by agents, *Testimony,* 126, 93; and hints from the District Attorney's office that certain agents were undesirable did not cause their powers to be cancelled. *Testimony,* 100; *cf.* 277.

[6] Testimony of Mr. and Mrs. Gordon, 187 *et seq.* This man charged the same family $550 "expenses" for the return of her brother, which was effected by the police department. He did not turn over to the surety company the ring, which was worth about $1500. The amount of the bail was $1500.

[7] Anna Stupka, who spoke no English, was charged forty dollars by a professional bondsman for a three hundred dollar bond for her appearance in a Magistrate's Court the next day; and then bail was furnished only upon her husband's assigning a bank-book and signing an indemnity agreement. *Testimony,* 375 *et seq.* Charges of five per cent seem not to have been unusual. *Ibid.,* 20 *et seq.,* 232. Officers of some surety companies had "heard a lot of talk" about "bonuses," *ibid.,* 98, 131, 519; others had "never asked" their agents about it, *ibid.,* 64; although complaints brought to the head office resulted in refunds of the whole premium, *ibid.,* 217, 519.

[8] The case of Frank Rio, cited by H. B. Chamberlin, *The Chicago Crime Commission* (1920) 11 Journ. Crim. Law 391-4.

bond procedure must steer. It must be made easier for the poor, casual misdemeanant to avoid wasting in jail, with the resultant loss of earning power and reputation, harmful to society and to the individual. And it must be made harder for the professional criminal to slip out with the aid of the professional bondsman and the professional indemnitor. Moreover, the theory of the law of criminal bail is changing.

The change is reflected in the law relating to the indemnification of the surety. Thus the older cases stress the element of personal suretyship: the accused is bailed into the custody of his friends. Any factor is deemed illegal which will decrease their responsibility or relax their vigilance. Upon this view, for the surety to accept property from the accused is illegal;[9] and in England renders the surety liable criminally.[10] This theory prevents an *indebitatus assumpsit* by the bail against the principal;[11] and renders illegal an express agreement to indemnify, either by the accused or by a third party.[12]

Modern law, however, has materially modified the personal element in bail. Thus by statute generally the defendant may make a deposit of cash in lieu of bail.[13] The courts have seized upon this statutory change to emphasize that practically it is the fear of pecuniary loss alone to which the state looks to secure the appearance of the accused.[14] "The distinction between bail and suretyship is pretty nearly forgotten," Mr. Justice Holmes has said in enforcing an express agreement by the accused to indemnify the bail.[15] A court with this point of view will find no difficulty in enforcing an agreement by a third party;[16] or in giving the bail a quasi-contractual action against the principal.[17] It is to the latter theory of

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[9] *Herman* v. *Jeuchner* (1885) L. R. 15 Q. B. Div. 561; see *People* v. *Ingersoll* (N. Y. 1872) 14 Abb. Pr. N. S. 23; *cf. Consolidated Exploration, etc. Co.* v. *Musgrave* [1900] 1 Ch. 37.

[10] *Rex* v. *Porter* (1909) 26 T. L. R. 200. Criticized adversely in (1910) 23 Harvard Law Rev. 560.

[11] *United States* v. *Ryder* (1884) 110 U. S. 729, 4 Sup. Ct. 196. This conclusion is implicit in the many cases holding that the promise of a third party to indemnify the criminal bail is not collateral within the statute of frauds. *Cripps* v. *Hartnoll* (1863) 4 Best & S. *414; *McCormick* v. *Boylan* (1910) 83 Conn. 686, 78 Atl. 335; *Anderson* v. *Spence* (1880) 72 Ind. 315. *Contra, Kingsley* v. *Balcome* (N. Y. 1848) 4 Barb. 131.

[12] *United States* v. *Simmons* (C. C. 1891) 47 Fed. 575. A distinction has been made by those who insist upon the personal element, allowing a third party to indemnify the bail, since the state still has two persons other than the prisoner to whom to look. See (1909) 22 Harvard Law Rev. 530; *cf. People* v. *Ingersoll* (N. Y. 1872) 14 Abb. Pr. N. S. 23. The distinction cannot be said to be live under the broad reasoning upon which the modern cases permit or refuse the bail indemnity.

[13] Ky., Crim. Code (1919) §§ 89-92; N. J., Comp. Stat. (1910) 1828 § 25; N. Y., Code Crim. Proc. § 586; S. Dak., Rev. Code (1919) § 4600. In the lower criminal courts only, for minor offenses: Ill., Ann. Stat. (J. & A. 1913) § 3363; Wash., Laws 1919, c. 76. This power is generally regarded as strictly statutory. *Smart* v. *Cason* (1869) 50 Ill. 195; *McNamara* v. *Wallace* (1904) 97 App. Div. 76, 89 N. Y. Supp. 591, (*semble*). But see *Moyser* v. *Gray* (1632) Cro. Car. 446; Petersdorff, *Bail* (1824) 506.

[14] According to the medieval formula, the surety bound himself "body for body, property for property." But the rigors of this rule were early abated. Esmein, *History of Continental Criminal Procedure* (1913) 67-69.

[15] *Leary* v. *United States* (1912) 224 U. S. 567, 575, 32 Sup. Ct. 599. *Accord, Carr* v. *Davis* (1908) 64 W. Va. 522, 63 S. E. 326; *Simpson* v. *Robert* (1866) 35 Ga. 180.

[16] *Moloney* v. *Nelson* (1899) 158 N. Y. 351, 53 N. E. 31, affirming (1896) 12 App. Div. 545, 42 N. Y. Supp. 418; *Western Surety Co.* v. *Kelley* (1911) 27 S. Dak. 465, 131 N. W. 808; *Stevens* v. *Hay* (1871) 61 Ill. 399.

[17] *Badolato* v. *Molinari* (1919) 106 Misc. 342, 174 N. Y. Supp. 512; Brandt, *Suretyship* (3rd ed. 1905) § 610. To the same effect but not well considered: *Fagin* v. *Goggin* (1879) 12 R. I. 398; *Reynolds* v. *Harral* (S. C. 1847) 2 Strobh. L. 87.

bail that the New York court has adhered; Magistrate Simpson hints that since it is statutory in origin, the Legislature may have the key to reform in causing our statutes to conform to the older theory. But such a process would overlook the altered social conditions which have made bail impersonal; these cannot be changed back by legislation.

A study of the evidence in the inquiry, in the light of this background, shows that the canker is the professional bondsman. How can he be eradicated? Those in touch with the situation do not think that a licensing system would be advisable.[18] One of Magistrate Simpson's suggestions, a philanthropic fund, might help the most unfortunate; but can hardly be deemed a cure. The sphere of the surety companies must also be considered. By statute Michigan forbids corporate suretyship upon criminal bail bonds.[19] This attitude may reflect a fear of the lack of personal responsibility in the large corporation which may more readily pay a forfeiture than pursue a defaulting defendant. But this danger, the hearings show, is not nearly so grave as the lack of direct contact between the accused and the corporate organization. The companies' lack of control of their agents opens the door to the professional bondsman.

On the other hand, the withdrawal of the surety companies from the business would leave the field open for the bond shark; and Magistrate Simpson correctly urges against such action. To secure the needed control the Magistrate advises a statutory limit of two per cent premium for the surety company; and a law that a total charge of more than three per cent shall be prima facie excessive and illegal.[20] This leaves no profit for the bondsman who is working on commission;[21] but it seems sufficient return to enable the company to continue the business.

The qualifications for bail in the New York Code are in the language of the common law: the surety must be a resident, householder and freeholder, and worth the amount of the bond.[22] It is not at all clear that this necessitates putting up realty as bail; but the provision is in practice so construed. Since the accused, in lieu of a surety, may put up cash or Liberty bonds in any event, perhaps the strict construction is a safer one: and it is Magistrate Simpson's suggestion that the professional bondsman's path be made harder[23] by making a bail bond a lien upon

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[18] Magistrate Simpson's constitutional doubts do not appear valid: the bondsman seems sufficiently connected with the administration of justice to warrant regulation. The provisions should, of course, apply only to those writing more than, say three bonds a month.

[19] Mich., Comp. Stat. (1915) § 9219. Practically all states permit it. Ill., Ann. Stat. (J. & A. 1913) § 2536; Mo. Rev. Stat. (1919) §§ 1002-4; N. J., Comp. Stat. (1910) 2856 § 46; N. Y., Insurance Law §§ 181-3, but no single risk is to be more than ten per cent of the capital and surplus of the company, under Insurance Law § 24. *Industrial, etc. Trust, Ltd.* v. *Tod* (1900) 56 App. Div. 39, 67 N. Y. Supp. 362. It was indicated in the *Tod* case that the value of collateral might be deducted in calculating the risk; but the Attorney General has advised that State Departments may not undertake this calculation. (N. Y. 1914) Op. Att. Gen. 202.

[20] The total amount paid and the persons to whom paid are to be endorsed upon the bond. The best surety companies provide for such a statement in their forms: the applicant "certifies that he has paid a *service* fee for *personal* benefit of the representative of the Company, such fee being $——."

[21] *Testimony*, 30 *et seq.*, upon the confession of one such bondsman.

[22] N. Y. Code Crim. Proc. § 569. Notice must be given in certain cases of the "real or personal property of the surety," § 571. Other tests are ". . . residents . . . worth . . . the sum," Mo., Rev. Stat. (1919) § 3920; "Each of the bail shall be worth the amount of the bail," Ill., Ann. Stat. (J. & A. 1913) § 3995. " . . . any competent person who may reside in this state, whether the real estate owned by such surety be located in the county, ..." N. J., Comp. Stat. (1910) 1828, § 25. See Petersdorff, *Bail* (1824) 505.

[23] In Chicago a professional bondsman had property scheduled, giving him a credit with the state of $3375. Over a hundred thousand dollars of live bonds

the realty from the time of acknowledgment, as is the law in some states at present.[24]

Statutes generally prohibit an attorney from going bail for his client.[25] The hearings reveal that it has been to some extent the practice for surety companies to require or permit attorneys to indemnify them. This seems but an indirect way of avoiding the purpose of the statute, and should be rendered impossible, so long as the statute remains in force.[26]

So long as revision of the law of bail is contemplated, there is another reform which may well be considered, although it was not agitated at the hearings. This is the prohibition of admission to bail after conviction, especially of a felony, and pending appeal. Kentucky appears to be the only state expressly forbidding it;[27] although it is noteworthy that the constitutions of ten states posit the right to bail only "before conviction."[28] Should not the presumption of innocence which is the foundation of the right to bail be overcome by a conviction?[29]

Legislative reform cannot alone cure the evils of the bail bond situation. Constant vigilance of the officers charged with the control of bail must be assured; the magistrate must inquire into the collateral if the bondsman will not; the district attorney must be firm to enforce forfeitures.[30] And, chief of all, persons accused of crime must be brought to trial more speedily. It is here that the greatest room for reform lies: with a more efficient administration of the criminal law, the professional bondsman will disappear.[31]

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were outstanding in his name at once, despite an unpaid forfeiture of $3500 which should have wiped out his credit. During the following six months he was surety upon $269,500 of bonds. H. B. Chamberlin, *The Chicago Crime Commission* (1920) 11 Journ. Crim. Law 391. See *Editorial* (1916) 53 Nat. Corp. Rep. 557.

[24] N. J., Comp. Stat. (1910) 1828 § 25; *State* v. *Stout* (1830) 11 N. J. L. *362, 366, 369. In Illinois, *cf.* footnote 23, the lien does not attach till the bond is reduced to judgment or execution is awarded. *McKee* v. *Brown* (1867) 43 Ill. 130.

[25] Ill., Ann. Stat. (J. & A. 1913) § 8633 (nullifying the decision in *Jack* v. *People* (1857) 19 Ill. 57; Ky., Crim. Code (1919) § 80; Mich., Comp. Stat. (1915) § 12080; Mo., Rev. Stat. (1919) § 998; N. Y., Gen. Rules Practice V. The attorney has been said to be competent bail at common law, Petersdorff, *Bail* (1824) 506; but see *Regina* v. *Scott Jervis,* The Times, Nov. 20, 1876; and *cf. Capon* v. *Dillamore* (1824) 1 Bing. 423.

[26] Indemnity by the attorney was bad at common law. *Capon* v. *Dillamore* (1824) 1 Bing. 423.

[27] Ky., Crim. Code (1919) § 75. The English practice is strongly to the same effect, *Bail* (1914) 78 Just. Peace 447. *Cf. Bennett* v. *People* (1880) 94 Ill. 581; *United States* v. *St. John* (C. C. A. 1918) 254 Fed. 794.

[28] Ark., II § 8; Conn., I § 14; Iowa, I § 12; Me., I § 10; Mich., II § 14; Minn., I § 7; Miss., III § 29; N. J., I § 10; S. C., I § 20; Wis. I §8.

[29] Garofalo condemns it as contrary to reason, *Criminology* (1914) 345. See R. W. Millar, *Moderization of Criminal Procedure* (1920) 11 Journ. Crim. Law 366.

[30] In Chicago in 1919, 426 bonds were forfeited, amounting to over $1,400,000. Of this amount only $20,000 was collected. 11 Journ. Crim. Law 392.

[31] On Detroit's experience, see H. Harley, *Detroit's New Model Criminal Court* (1920) 11 Journ. Crim. Law 404. On the night court as a factor in reducing the bail bond evil, see M. E. Paddon, *Inferior Criminal Courts of New York City* (1920) 11 Journ. Crim. Law 11.

Out of the 5,902 bail bonds taken in the City Magistrates' Courts in New York during the last six months of 1920, approximately forty per cent were furnished by surety companies, sixty per cent by individual bondsmen. Of these, twenty-one per cent were taken for appearance after first hearing, sixty-one per cent to answer trial in misdemeanor and felony cases. Information kindly supplied by the Statistical Bureau of the Magistrates' Courts.